BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

W. C. LAYCOCK ET AL., PETITIONERS,

VS.

HIDALGO COUNTY WATER CONTROL & IMPROVEMENT DISTRICT No. 12 ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

I.

OPINIONS OF THE COURTS BELOW.

The opinions, majority and concurring, of the United States Circuit Court of Appeals for the Fifth Circuit (R. 557-562), are reported in 142 F. 2d 789. The judge before whom this cause was tried in the United States District Court for the Southern District of Texas, wrote no formal opinion, but filed findings of fact and conclusions

of law (R. 135-140). Among these findings of fact is the following:

> "(d) All the facts existed necessary to give this Court jurisdiction in cause No. 891, the parties were properly before the Court, and the trial was properly had, *and I find the Judgment to be valid.* I find, however, that this Court in that case did not have before it the facts which are now before the Court and which were before the State Court and which were the basis of the holding of the State Court" (Italics ours).

II.

JURISDICTION.

A statement of the grounds on which the jurisdiction of this Honorable Court is invoked is set forth in the preceding Petition under heading II (p. 6) and are hereby adopted and made a part of this brief.

III.

STATEMENT OF THE CASE.

A statement of the case has been made in the preceding Petition under heading I (pp. 2-6) and is hereby adopted and made a part of this brief.

In view of the statement in the concurring opinion (R. 562), to the effect that:

> "The plaintiff in judgment was no *bona fide* holder, *but a party to a fraud* by which the bonds were gotten from the district" (Italics ours);

Petitioners desire to call the Court's attention to the following record facts, supplementary to the statement of the case in the Petition, *supra.*

Respondents claimed in the State court, and they claim in this suit, that the Interim Bonds were fraudulently exchanged for a water permit, and that these Petitioners learned about this exchange some years later before they purchased the bonds and coupons sued on. However, as will be pointed out, this exchange was expressly condoned by the Respondent District through its present Board of Directors, and a judgment of a State court was entered and spread on the minutes of the District which purported not only to validate the bonds but to approve a settlement between the District and the party who they say perpetrated the fraud. After having settled wih the so-called "thief" (R. 394-395), and after having permitted him to peddle his bonds for approximately five years, during which time the Respondent District held said bonds out to the public as valid obligations by recitations in its official minutes, it now contends that these Petitioners are parties to the fraud which took place years before they ever heard of the bonds.

The facts leading up to the entry of the judgment in Cause No. 891 D. L., *W. L. Shumate, Jr.*, v. *Hidalgo County Water Control and Improvement District No. 12*, which petitioners are here seeking to enforce, are as follows:

> On November 17, 1930, a suit, called the Montalvo suit, was instituted in the District Court of Hidalgo County asserting that the interim bonds of the defendant water district had been fraudulently exchanged for a water permit, and seeking to enjoin their transfer by the then holders (R. 499, 90-102).
>
> The entire transaction about which Respondents now complain was exposed in clear and unmistakable language in the petition in that case. In fact one of the appellees, now a member of the board of directors of the District, L. A. Gannaway, was a plaintiff in that case and swore to that petition (R. 102).

Thereafter the original board of directors (who the appellees claim committed the fraud) resigned and the present board, including L. A. Gannaway one of the plaintiffs in the Montalvo suit, took their places (R. 506).

Subsequently, the newly elected directors (the present board) filed a pleading in that suit (R. 112-113), and thereby took charge of the case (R. 503-504).

They discharged the plaintiffs' attorneys (R. 503-504) and employed the law firm of West and Hightower of Brownsville, Texas, to investigate the transactions referred to in the Montalvo petition. These attorneys, together with another attorney, D. W. Glasscock of Mercedes, Texas, gave them an opinion to the effect not only that the bonds were valid, but that the exchange of the bonds for the water permit could not be successfully attacked, and that their investigation did not disclose any actual fraud in the transfer (R. 396-404).

This opinion was ordered spread upon the minutes of the District on March 1, 1932 (R. 392-395).

Judgment was then entered by the District Court of Hidalgo County holding the bonds valid and expressly decreeing that their exchange for the water permit was lawful (R. 505, 114-117).

This judgment was likewise spread upon the minutes of the District by resolution of the board of directors passed March 29, 1932 (R. 515, 507).

From that day until the present time, the attorneys' opinion and the copy of that judgment have remained upon the minutes of the District, unless they have been removed since this case was tried.

From the foregoing, it is apparent that had not the judgment in the Montalvo case been entered, Petitioners would never have been led into the purchase of these bonds. But with that judgment not only a matter of

record in the court house, but spread upon the District's Minutes as well, there was no fraud resulting from Petitioners' purchase of these bonds. All the wrongs about which Respondents now complain had been condoned and approved by them, and the public so advised by their official minutes.

The bonds had been approved by the Attorney General of Texas (R. 238-240), a prominent bond attorney, J. T. Sluder, had rendered an opinion on their validity (R. 522), and other bond attorneys had rendered similar opinions, but same do not appear in this record, as they appeared in the record in the companion case of *Holderman* v. *Hidalgo County Water Control Improvement District No. 12*, (5th Cir.) 142 F. 2d 792.

Some three or four years after these attorneys' opinions had been written, and after the opinion of D. W. Glasscock and West and Hightower had been spread upon the minutes of the District, and about the same length of time after the judgment in the Montalvo suit had been spread upon these minutes, the Petitioners first began their negotiations for the purchase of these bonds and coupons (R. 429). Up to that time neither of the Petitioners had ever heard of these bonds. They made inquiries concerning their validity. Based upon justifiable reliance on the recitations of the judgment in the Montalvo case, which the Directors of the Respondent District held out to the world on their official minutes, and on the advice of their attorney (R. 419), Petitioners purchased the bonds from which the coupons placed in evidence were taken. It appears that they saw opinions written by numerous attorneys attesting to the validity of the bonds. They saw the opinion of the attorneys for the District spread on the minutes of the District, and they also saw a judgment of a court of competent jurisdiction spread on those minutes, reciting that the bonds

were valid and that the exchange for the water permit was in all things regular. Of course, neither the opinions nor the judgment, as will be pointed out hereafter, made the bonds valid if they were issued in excess of the constitutional limitations, but certainly that judgment validated any irregularity in the transfer of the bonds, and a bond buyer was entitled to rely upon the recitations therein.

The foregoing supplemental statement presents the true picture from the Petitioners point of view and clarifies the statement made in the concurring opinion, which otherwise might be misconstrued. The Petitioners herein were not actual parties to any fraud. If a fraud was committed, it was by other persons to them unknown and they could be parties to it only constructively, if at all.

IV.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in holding that the trial court properly enjoined Petitioners from henceforth claiming any rights under the judgment in Cause No. 891 D. L., and from transferring same to other persons, after holding such judgment to be valid.

2. The Circuit Court of Appeals erred in holding that the trial court properly refused to enforce its own valid, final judgment in a law action, when properly requested to enforce the same.

3. The Circuit Court of Appeals erred in holding that the trial court properly refused Petitioners any relief for the enforcement of the final judgment in a law action on the ground that a mandamus is a discretionary writ and may be withheld on equitable principles.

4. The Circuit Court of Appeals erred in holding that the trial court properly refused Petitioners any relief for the enforcement of their valid, final judgment in a law action on authority of *Brownsville* v. *Loague*, 129 U. S. 493.

V.

ARGUMENT.

Summary of Argument.

POINT 1. Assuming that the courts below were correct in denying Petitioners any remedy to enforce their judgment, they had no right to go farther and take such judgment from petitioners by injunctive order in the absence of a successful direct attack upon such judgment. The most that they could do would be to leave the parties as they found them.

POINT 2. The trial court having upheld the validity of its former judgment in a law action, could not refuse to enforce it through the expedient of looking back through the judgment in search for errors in its rendition, which errors should have been, but were not, presented when the original cause was tried.

POINT 3. Mandamus against public corporations being the only remedy available to judgment creditors, since execution, as such, is not effective, is treated as being a writ in the nature of an execution for the purpose of collecting such judgments. It is, therefore, distinguishable from original proceedings for mandamus against public officials, and from mandatory writs to enforce equitable judgments. The so-called mandamus to collect judgments in law actions does not give the courts jurisdiction to re-try and re-adjudge the cases in which judgments were had, to enforce which mandamus is sought.

POINT 4. The case of *Brownsville* v. *Loague*, 129 U. S. 493, dealt with a situation where there was a total absence of power to issue bonds for the proposed purpose. It did not deal with a situation such as is presented in the case at bar where the issuing body possessed the power to

issue the bonds but defectively exercised such power by issuing them for an amount in excess of that authorized by the vote of the people. Subsequent decisions have uniformly construed *Brownsville* v. *Loague* as applying only where there is a total absence of power to issue any such bonds and as not applying where there is merely a defective exercise of such power.

POINT 1.

No authority to take from petitioners all rights in a valid final judgment at law in absence of successful direct attack, even though remedy for enforcement may be denied.

As pointed out in the Statement of the Case, *supra*, Respondents made a direct attack upon the judgment in Cause No. 891 D. L. here sought to be enforced (R. 39-64). This attack was unsuccessful, and the trial court held the judgment valid (R. 138). No cross appeal was taken, and under authority of *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, that issue is *res judicata*.

Absent this direct attack and consequent relief, Respondents have no right to injunction against Petitioners, or otherwise to set aside the judgment. *Stoll* v. *Gottlieb*, 305 U. S. 165; *Dowell* v. *Applegate*, 152 U. S. 327; *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552.

We have here, therefore the anomalous situation of the trial court holding a judgment to be valid and refusing to set it aside in the face of a direct attack, and in the same breath enjoining the owners thereof from asserting any further claims under it and from transferring, selling and assigning same, or any part thereof (R. 142). This, we respectfully submit, violates the fundamental rule of *res judicata*.

It seems clear, therefore, that the holding of the majority of the Circuit Court of Appeals can in no event be upheld in so far as the injunction against Petitioners is concerned. Granting, for the sake of argument here, that the majority properly affirmed that part of the judgment denying Petitioners any relief, its action in affirming that part of the judgment granting the Respondents injunctive relief can be justified upon no proposition asserted by it.

The minority, recognizing the unsoundness of the position taken by the majority, placed its concurrence on a ground upon which the majority expressly refused to pass. Judge Sibley, disagreeing with the majority opinion on fundamentals, says that "all enforcement of the judgment ought not to have been enjoined by the decree appealed from, at the instance of the judgment debtor" (R. 562). But, because the State of Texas is a party to this suit, he reached the conclusion that the trial court's judgment was right. Granting the premise upon which Judge Sibley bases his concurrence, his opinion can be justified. The majority opinion cannot be. Either the injunction was properly granted at the request of the State, or it was not properly granted at all.

We think, therefore, that if the holding of the Circuit Court of Appeals is to be sustained, it must be upheld upon the conclusion reached in the minority opinion.

This raises a question of far reaching import. Can a State, in its sovereign capacity, come into a federal court and attack a final judgment of that court rendered against one of its public corporations which such State has by statute vested with the power to sue and be sued in the courts?

By the provisions of Article 7880-51, Revised Civil Statutes of Texas (App. 74), the Respondent District

is given the power to sue and be sued. For convenience, we quote this statute here:

> "Art. 7880-51. Right to sue and be sued.
>
> All districts can sue and be sued in any and all courts of this State in the name of the district. All courts shall take judicial knowledge and notice of the establishment of a district and the boundaries thereof. Such districts shall contract and be contracted with in the name of the district. (Acts 1925, 39th Leg., ch. 25, p. 98, Sec. 51.)"

Having given these water districts the power to sue and be sued and to contract and be contracted with, the State has clothed them with semi-independence and is precluded from throwing about them its cloak of sovereignty. *Kiefer & Kiefer* v. *Reconstruction Finance Corporation*, 306 U. S. 381.

Creditors, seeking to enforce in the courts their contracts with water districts, may not join the State, as such, as a party defendant. They reach it through its agent, the district, as to which it has waived its immunity. *Bank of United States* v. *Planters Bank*, 9 Wheat. 904.

If a final judgment against such an agency of the State which possesses the power to sue and be sued be not binding on the State, a creditor of such agency would be unable to obtain a final judgment against its debtor in any court. If a State be permitted to come into court after such a judgment has become final and attack it by virtue of its sovereignty, the doctrine of *res judicata* is meaningless. The far reaching effects of such a decision cannot be magnified.

A valid, final judgment was obtained against the Respondent District in so far as that suit is concerned. A judgment so obtained was binding, not only on the Dis-

trict as such, but on the State as well. By virtue of having clothed the District with power to sue and be sued, the State consented to be bound by any judgment rendered against its creature. There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the State is *res judicata* in relitigation of the same issue between that party and another officer of the same government. *Tait* v. *Western Maryland R. Co.*, 289 U. S. 620; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 402.

By virtue of the provisions of Article 7880-25a (App. 59-60), the State of Texas reserved to itself the right to contest the validity of bonds of its water districts before they have been reduced to judgment. *State ex rel. Abney* v. *Miller*, 133 Tex. 498, 128 S. W. 2d 1134, 1135. But such reservation of power cannot be construed to permit the State to contest the validity of such bonds after they have been reduced to judgment and after such judgment has become final.

The fact that the State court permitted the judgment in the Montalvo suit to be set aside in *Miller* v. *State*, (Tex. Civ. App.) 155 S. W. 2d 1012, does not establish the rule announced in the minority opinion. As pointed out in the majority opinion, the answer to that contention lies in the fact that the Montalvo judgment was not, as is the judgment in No. 891 D. L., a money judgment in favor of a private suitor, but was merely a general declaratory judgment that the bonds were valid, entered in a suit in which no bondholder was seeking a money judgment on his bonds. At that time there was no general declaratory judgment statute in Texas. That suit did not purport to be brought under the bond validating statute.

We respectfully submit, therefore, that even if the State of Texas has the power to reserve to itself the right

to attack valid, final judgments of the federal courts rendered against its water districts, which we cannot believe it does have, it has nevertheless not attempted to do so, and the holding in *Miller* v. *State*, *supra*, has no bearing on the right of the State to disregard the judgment of the trial court in No. 891 D. L.

POINT 2.

A valid judgment of a court of competent jurisdiction may not be refused enforcement unless and until properly set aside.

As the owners of a valid, final judgment of a court of competent jurisdiction, Petitioners are entitled to invoke the powers of that court to enforce it. The judgment is *res judicata*, not only of the validity of the coupons sued on, but of the remedy provided by law for its enforcement. *Ralls County Court* v. *United States*, 105 U. S. 733; *United States ex rel. Ranger* v. *City of New Orleans*, 98 U. S. 381; *United States ex rel. Harshman* v. *Knox County Court*, 122 U. S. 306; *Riggs* v. *Johnson County*, 6 Wall. 166.

The fact that a State court subsequently held the bond issue upon which the judgment was based to be unconstitutional, does not render such judgment invalid, irrespective of whether or not the issue of constitutionality was raised on the trial. *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371; *Woods Bros. Const. Co.* v. *Yankton County, S. D.*, (8th Cir.) 54 F. 2d 304, 81 A. L. R. 300.

This is the settled law in Texas. *Commonwealth of Mass.* v. *Davis*, (Tex. S. Ct.) 168 S. W. 2d 216, 220; *Security Trust Co. of Austin* v. *Lipscomb County*, (Tex. S. Ct.) 180 S. W. 2d 151. It is based on the fundamental rule announced in *Cromwell* v. *County of Sac*, 94 U. S. 351, to the effect that a judgment "is a finality as to the claim or de-

mand in controversy * * * not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

It is apparent, therefore, that the Petitioners are entitled to the relief sought unless barred therefrom by the reasoning and authorities relied upon in the majority opinion of the Circuit Court of Appeals, which will be considered under the succeeding Points.

POINT 3.

Mandamus to enforce a judgment at law against a public corporation in aid of execution does not give court authority to relitigate original cause of action.

The majority opinion of the Circuit Court of Appeals bases its affirmance of the judgment upon the ground that mandamus, while referred to as a legal remedy, is nevertheless governed by equitable principles and may be refused if, by reconsidering the subject matter of the judgment, the court finds it inequitable to grant the relief. The minority opinion properly dissents from this proposition. The majority, we think, confuses the rule as applicable to proceedings to enforce judgments in equity as distinguished from judgments at law.

Analysis of the cases involving the remedy of mandamus reflects three different rules which have been applied to this remedy.

1. That final judgments *at law* against municipalities must be enforced by this writ because execution is not available in most instances. Mandamus is, then, in effect, an execution. This is exemplified by the case of *Ralls County* v. *U. S.*, 105 U. S. 733, and others cited above in this brief.

2. Where a party returns to *a Court of Chancery* to obtain its aid in executing a former decree *in equity*, it is at the risk of opening up such decree as respects the relief to be granted on the new bill. *O'Brien* v. *Wheelock*, 184 U. S. 450; *Lawrence Mfg. Co.* v. *Janesville Cotton Mills*, 138 U. S. 552. Note: 139 A. L. R. 1507. This only applies where the original proceeding was *in equity*. It does not apply to *judgments at law*. See full discussion of this subject in *Drainage District No. 4* v. *Murphy*, (8th Cir.) 119 F. 2d 390.

3. Where *original proceedings* are instituted for the purpose of compelling public officials to act, mandamus will not be granted if the duty sought to be enforced is one which ought not to be performed. *This applies only to original proceedings and not to ancillary proceedings to enforce judgments previously obtained in courts of law.* The rule is exemplified by the holdings in the following cases.

Duncan Townsite Co. v. *Lane*, 245 U. S. 308 (Indian case).

U. S. v. *Fisher*, 222 U. S. 204 (Indian case).

U. S. v. *Ickes*, 117 F. 2d 769 (Indian case).

U. S. v. *Dern*, 289 U. S. 352 (Original proceeding against the Secretary of War).

This distinction is made apparent when the text relied upon in the majority opinion is studied. The majority bases its holding on the statements in 34 Am. Jur., Mandamus, Secs. 34-36, 40, pp. 830-834. The cases cited in support of these sections of the text deal with situations which fall under the second and third classifications, *supra*. Secs. 176 and 177, pp. 950-952, of the same text are applicable to the case at bar. A short quotation from this text illustrates this point. There it is said:

"Nor can the public corporation defeat the judgment and mandamus by drawing in question the validity and enforcibility of the cause of action or claim

upon which the judgment is based although the judgment was taken against the corporation by default. So, the respondent cannot successfully urge want of consideration for the claim or invalidity of the bonds or coupons on which the judgment is rendered. And it is generally held that it is no defense to a writ of mandate to compel a public corporation to issue its warrant in payment of a judgment, that the contract upon which the judgment was obtained was void because, at the time of entering into it, the corporation was beyond the constitutional limit of indebtedness, since such defense should have been set up in the action, and the recovery of the judgment is not itself the creation of the indebtedness," citing *Louisiana ex rel. Nelson* v. *St. Martins Parish*, 111 U. S. 716, and *Davenport* v. *Lord*, 9 Wall. 409.

We respectfully submit that the majority opinion incorrectly announced the rule concerning ancillary writs to enforce valid judgments at law.

POINT 4.

Brownsville v. Loague applies only where there is total absence of power, not where there is a defective exercise of power.

A proper understanding of this point requires consideration of the nature of the Respondent District and of the bonds it is authorized to issue. The District is organized under authority of Article XVI, Section 59, of the Constitution of Texas, and is governed by the provisions of Article 7880, Sections 1 *et seq.*, Revised Civil Statutes of Texas (App. 43 to 133).

By virtue of such constitutional and statutory provisions, the Respondent District was authorized to issue three types of bonds:

(a) Preliminary bonds;

(b) Construction bonds;

(c) Interim Bonds.

The power and authority to issue each type of bonds is outlined in the opinion in the case of *State ex rel. Abney* v. *Miller*, 133 Tex. 498, 128 S. W. 2d 1134, 1136, as follows:

> "The applicable statutes enacted pursuant to such authority are Vernon's Civil Statutes, Title 128, Chapter 3A, Article 7880-1 *et seq.* These statutes make provision for the issuance of three classes of bonds. First, preliminary bonds, the sale of which is designed to furnish funds to make preliminary investigations; second, construction bonds, designed to furnish funds for the construction of irrigation facilities; and third, interim bonds, designed to make readily available funds for engineering and other expenses arising after construction bonds have been voted and before they are sold. The bonds involved in the present litigation are of the third class. By the express provision of the Constitution authorizing the creation of these districts and the issuance of bonds by them (Art. 16, Sec. 59 (c)), the Legislature is forbidden to authorize the issuance of any bonds unless such proposition shall first be submitted to the qualified taxpaying voters of the district.
>
> "The statutes (Article 7880-1 *et seq.*, Vernon's Civil Statutes) provide that preliminary bonds and construction bonds must be voted upon. There is no provision for a separate vote upon interim bonds. If, as contended, these bonds create an indebtedness against the district in addition to that authorized by the construction bonds and are not voted upon, they are obviously void, because in contravention of the express language of the constitution above referred to. A consideration of the statutes relating to these bonds has led us to the conclusion that no additional indebtedness against the district is created by their issuance. They constitute, in effect, a method of

making readily available a portion of the proceeds of the sale of construction bonds in order that the project for which the district was formed may proceed without delay. The right to issue such bonds in accordance with the terms of the statutes is a right flowing from the right to issue construction bonds. According to the allegations, at the time the construction bonds were voted, there was in effect a statute (Art. 7880-84a, Vernon's Civil Statutes, Acts, 1929, 1st Called Sess., Ch. 82, Sec. 1, later amended) authorizing a district which had voted construction bonds to issue interim bonds in an amount equal to ten per cent of the principal amount of the construction bonds which had been voted and not sold. The right so to issue said bonds was a right running with, and attached to, the construction bonds. When the district voted on the proposition of the issuance of construction bonds, the provisions of the applicable statutes became a part of the proposition voted upon. *San Saba County* v. *McCraw*, 130 Tex. 54, 108 S. W. 2d 200.

"When the voters of the district indorsed the proposition of issuing construction bonds in the principal sum of $5,500,000, they also voted to authorize the issuance of interim bonds in the amount and upon the terms then prescribed by statute. They did not authorize an indebtedness of $5,500,000 represented by construction bonds and an additional indebtedness represented by interim bonds, but they did authorize the issuance of interim bonds as a convenient method of procedure pending the sale of the construction bonds, which interim bonds were to be discharged by the taxes levied in support of the construction bonds and the proceeds of the sale of the construction bonds. We overrule the contention that the statute authorizing the issuance of interim bonds contravenes the constitutional provision above referred to, which denies to the Legislature the authority to authorize the issuance of bonds without a vote of the district. We hold that interim bonds, when issued in accordance with the statute existing at

the time the construction bonds are voted, are themselves authorized by the voters."

It is settled, therefore, that the Respondent District had *the power* to issue interim bonds. It was limited in this power to ten per cent of the amount of the construction bonds authorized by vote, according to the decision of the Texas Supreme Court.

In order that it may be demonstrated that the only vice in these bonds lay in the fact that they were issued in excess of the constitutional limitations, the following recitation of the facts leading up to their issuance may be helpful.

On March 14, 1930, the voters of the Respondent District authorized the issuance of construction bonds in the amount of $5,500,000 (R. 203-204).

At the time this vote was taken Article 7880-84a, (1) (App. 90) provided:

> "The securities evidencing such emergency loan shall be known as 'interim Bonds'. They shall mature not later than five (5) years from date of issue, and shall be redeemable at any time prior to maturity as is hereinafter provided. The principal amount of such emergency loan shall not exceed ten per cent (10%) of the principal amount of the bonds of the district which have been voted, but not sold; provided, however, that before the issuance of such bonds the board of directors of any district desiring to issue same may by resolution duly passed limit the issue to any amount less than ten per cent (10%), and when such amount is determined and fixed by resolution, no additional 'interim bonds' may be issued and sold until all outstanding 'interim bonds' have been paid in full."

Subsequently the Legislature of Texas amended this section, effective April 9, 1930, changing the terms thereof

so as to provide that such interim bonds could be issued in an amount equal to twenty-five per cent of the construction bonds, and the maturity date could be fixed at not later than ten years from the date of their issuance (App. 90).

The change in the permissible maturity date is wholly immaterial. Both statutes are identical in regard to the following particulars:

> "To secure the loan evidenced by such 'interim bonds' the board of directors shall appropriate the tax levied for the payment of the bonds deposited to the credit of the 'interest and sinking fund account' of such 'interim bonds', or so much of such tax as may be necessary for that purpose, and the proceeds of such tax, when collected shall be devoted exclusively to the payment of the principal and interest of such 'interim bonds'; provided, however, that nothing in this Act shall be construed as prohibiting the sale of any bonds of the district deposited to the credit of the 'interest and sinking fund account' of the 'interim bonds', or any other bonds of such district, but in event of the sale of any such bonds it is hereby made the duty of the district depository to apply the proceeds to any such sale, first, to the payment of the principal and accrued interest of all such 'interim bonds', and the remainder to the purposes for which any such bonds may have been authorized; and, provided, further, that in the event none of the bonds of the district shall have been sold at the time of the maturity of any installment of the principal or interest on the 'interim bonds', it shall be the duty of the depository to cancel bonds so deposited, and annexed interest coupons, equal in amount to the principal and interest of any such 'interim bonds' so paid off and discharged.
>
> "Said 'interim bonds' shall be redeemable, at the option of the board of directors of said district, at any

time or times prior to maturity, upon payment by the district of principal and interest accrued to date fixed for redemption by said board, and whenever any such 'interim bonds' are called in for redemption before maturity, notice thereof in writing shall be given to the bank or banking house named as the place of payment in such bonds, or to its successors or assigns, by the secretary of the board of directors of this district. The secretary shall designate in such notice the bond or bonds so called for redemption and payment, setting forth the number or numbers thereof, and the date fixed for the redemption thereof, which date shall be not more than sixty (60) days after the date notice of call for payment is made. In event any of such 'interim bonds' so called for redemption are not presented, the same shall cease to bear interest from and after the date so fixed for redemption" (App. 92-93).

From the provisions above quoted, it will be seen that in legal effect the maturity of the interim bond, that is, the time it will be paid, rests entirely within the discretion of the board of directors of the district. The interim bonds mature when the construction bonds are sold. In legal effect the so called "maturity" of an interim bond issued under Article 7880-84a cannot be either five or ten years, for the simple reason that no provision is made or required by the statute for the discharge of the interim bonds, other than the sale of construction bonds. Obviously these interim bonds cannot be paid at the end of five years, or at the end of ten years, unless the construction bonds are sold. If the construction bonds are not sold at the end of five years, or at the end of ten years, the bondholders' remedy is obviously an action to force the board of directors to sell the construction bonds. This being true, the so-called "five year maturity date," or the "ten year maturity date" is necessarily a covenant entered into be-

tween the district on one hand, and the bondholder on the other hand, which binds the bondholder not to sue for the purpose of forcing a sale of the construction bonds until the expiration of five years or ten years, as the case may be. A so called "five year interim bond," properly construed under the statute authorizing the issuance of said bond, is an obligation binding upon the district to pay the amount of money represented by the interim bond out of the sale of the construction bonds of the district, and a covenant binding upon the bondholder that he will not bring an action to force the board of directors to sell the construction bonds prior to five years from the date of issuance.

As a five year "maturity date" upon an interim bond must, under the statute, be construed as a covenant not to sue, a ten year "maturity date" upon an interim bond is also a covenant not to sue.

After the amendment of April 9, 1930, had gone into effect, and on April 28, 1930, the board of directors of Respondent District made and authorized the issuance of $1,265,000 in construction bonds, and $1,150,000 in interim bonds (R. 216-234). These interim bonds bore date of April 10, 1930 (retroactive of the date of their authorization), which date was one day after the amendment had become effective (R. 219).

However, only $656,000 worth of such interim bonds were actually put in circulation (R. 252-255, 510-511).

Because the amendment authorizing the issuance of interim bonds in the amount of twenty-five per cent of the construction bonds was not in effect at the time the vote was taken, the Supreme Court of Texas held that, although the District could have lawfully issued $550,000 in interim bonds under the authority of such vote, it could

not issue such bonds in excess of that amount. We quote the pertinent part of the opinion in *State ex rel. Abney* v. *Miller, supra*:

> "But we do not hold that the interim bonds under attack were validly issued. The election by which the district authorized the issuance of $5,500,000 of construction bonds was held on March 14, 1930. At that time the statute, Article 7880-84a, Acts, 1929, 1st Called Sess., Ch. 82, Sec. 1, authorized the issuance of interim bonds in an amount not to exceed ten per cent of the principal amount of the unsold construction bonds. The statute further provided that such interim bonds should mature not later than five years from the date of their issue. As above stated, the voters at that election authorized the issuance of interim bonds in the amount and upon the terms provided by that statute. They did not authorize the issuance of such bonds in any greater amount than, or upon any terms different from those provided therein. After the election authorizing the issuance of construction and interim bonds, an amendment of Article 7880-84a of Vernon's Statutes became effective authorizing interim bonds in an amount not to exceed 25 per cent of the principal amount of the unsold construction bonds, and providing that such bonds should mature not later than ten years from the date of their issue. The amendment became effective April 9, 1930. Acts, 41st Legislature, Fifth Called Session, Ch. 31, p. 163. The bonds here involved were issued the day after the amendment became effective. According to the allegations, they were issued to an amount of more than twenty per cent of the principal amount of the construction bonds and matured ten years from the date of their issuance. Such bonds were not authorized by the voters.
>
> "We do not hold that Article 7880-84a, as amended, authorizing the issuance of ten-year interim bonds to an amount of 25 per cent of the construction

bonds, is unconstitutional. That question is not involved. What we hold is that the amendment may not be given retroactive effect, but is applicable only to bonds voted after its effective date. The validity of interim bonds, as of all other bonds, must be tested by the law as it existed when their issuance was authorized. While interim bonds do not operate to create an additional indebtedness against the district, they are nevertheless bonds of the district and can be issued only in accordance with the statutes as they existed when they were authorized. By authorizing the issuance of $5,500,000 of construction bonds, the voters authorized the governing authorities of the district to issue five-year interim bonds to an amount equal to ten percent thereof and to hypothecate construction bonds to the extent of 110 per cent of the amount of the interim bonds as security for the payment of the latter. It was a valuable right given them by law to determine the amount of construction bonds which could be hypothecated and the length of time for which they might be hypothecated. Having determined by their vote the terms and conditions upon which interim bonds could be issued and construction bonds could be hypothecated, the officers of the district could not thereafter impose different terms and conditions. The petition is sufficient to allege that the voters authorized the issuance of five-year interim bonds to the amount of ten per cent of the construction bonds, and that such bonds were not issued, but instead there were issued ten-year bonds to an amount in excess of twenty per cent of the construction bonds. We, therefore, conclude that the validity of such bonds was sufficiently put in question to authorize the trial court to grant the temporary injunction."

It is apparent, therefore, that the only vice in these bonds lay in their issuance in excess of the limitations imposed thereon by statute at the time the vote was taken.

This clearly presents a situation where a bond issue is held to be invalid, not because of a total absence of power in the issuing body, but because of a defective exercise of such power.

The basis for the holding in *Brownsville* v. *Loague* is stated by Mr. Chief Justice Fuller on p. 502 of Vol. 129 U. S., as follows:

> "This express grant fell with the abrogation of the act by the taking effect on the 5th of May, 1870, of the new State Constitution, and in *Norton* v. *Brownsville*, *ante*, 785, we have held that the bonds, upon coupons detached from which the judgments sought to be collected here were rendered, were void, *not because of a defective exercise of the power to issue them, but because of a total absence of such power*" (Italics ours).

Had Article XVI, Section 59, of the Constitution of Texas, been repealed prior to the time the construction bonds were voted, the issuing body would have lacked any power to issue such bonds and the doctrine of *Brownsville* v. *Loague* would apply. But where there was a mere defective exercise of such power, as where the bonds were issued in an excessive amount, such doctrine does not apply. This was expressly held in the case of *Estill County* v. *Embry*, (6th Cir.) 144 Fed. 913, from which we quote:

> "Counsel for plaintiff in error rely upon the case of *Brownsville* v. *Loague*, 129 U. S. 493, 9 S. Ct. 327, 32 L. Ed. 780, but in that case there were two essential facts which distinguish it from the case at bar. These were, first, the City of Brownsville, in addition to its power to levy taxes for ordinary municipal purposes, was given power to levy taxes for the purpose of paying bonds, which it was authorized to issue for stock in a railroad corporation, by an act of the

Legislature passed February 8, 1870. On May 5 of that year a new constitution of the State went into effect, which repealed the act of February 8, 1870. On May 12, 1870, the mayor and aldermen of the city passed a resolution to submit to the electors the question of subscribing for the stock of the railroad company. The election took place on June 11th following, and resulted in favor of the proposition, and on July 1, 1870, the bonds were issued. Suit was brought thereon, and judgment recovered by default. Upon an application for a mandamus to compel the levy of a tax to pay the judgments, the Supreme Court held that the court might go behind the judgment, and inquire into the validity of the cause of action, and, upon ascertaining that the bonds on which the judgment rested were void, held that the writ should be denied. As is seen from the foregoing statement, the power to issue bonds and the power to levy taxes for paying such bonds had both been taken away by the new constitution. The bonds were held void, 'not' says Chief Justice Fuller, 'because of a defective exercise of the power to issue them, but because of a total absence of such power' * * *."

The Circuit Court of Appeals in the Estill County case, after demonstrating the distinction between a total lack of power, as existed in *Brownsville* v. *Loague*, and a defective exercise of power, as in the case at bar, had this to say with reference to the cause before it:

> "The question of their (the bonds') validity covered every fact essential thereto, and the judgment necessarily affirmed their existence. If the county has not in these suits presented every defense to the cause of action, it might have done so, and, it being the same cause of action, the estoppel is complete. If the plaintiff was entitled to the judgment he has recovered, he is entitled to the fruits of it;

and, if the county will not pay it, he is entitled to this remedy (mandamus)."

Subsequent to the decision in *Brownsville* v. *Loague*, it has been expressly held on numerous occasions that the judgment of a court conclusively estops the defendants from making the defense that the original indebtedness was in excess of the amount which the district had the power to create under the Constitution of the State. In the case of *Board of Commissioners* v. *Platt*, (8th Cir.) 79 Fed. 567, it is said:

> "Our conclusion is that in an action to enforce the collection of a judgment or the collection of bonds or coupons issued in payment of a judgment against municipal or *quasi* municipal corporations, the judgment conclusively estops the corporation from making the defense that the original indebtedness evidenced by it was in excess of the amount which the corporation had the power to create, under limitations of the Constitution of the State in which it was incorporated" (Citing numerous cases). * * * "the cases of *Commissioners* v. *Loague*, 129 U. S. 493, 503, 505, 9 S. Ct. 327, and *Kelly* v. *Town of Milan*, 21 Fed. 842; *id.*, 127 U. S. 139, 8 S. Ct. 1101, are not in conflict with this conclusion. The opinion and the effect of the decision in the former case are explained and limited in *Franklin Co.* v. *German Sav. Bank*, 142 U. S. 93, 100, 12 S. Ct. 147."

This case was followed, and the principle announced was reiterated, in *Geer* v. *Board of Commissioners of Ouray County*, (8th Cir.) 97 Fed. 435, the facts of which are closely analogous to those in the case at bar.

See also: *Franklin County* v. *The German Savings Bank*, 142 U. S. 93; *Mayor, etc., of the City of Helena et al.* v. *Helena Waterworks Co.*, (9th Cir.) 104 Fed. 113; *City of Mohall* v. *First Nat. Bank of Sleepy Eye*, (8th Cir.) 105

F. 2d 315; *City of Hialeah* v. *United States,* (5th Cir.) 87 F. 2d 953.

The fact that only a defective exercise of power, as distinguished from a total absence of power, is involved in this case is further illustrated by the facts recited in the concurring opinion in the companion case of *Holderman* v. *Hidalgo County Water Control and Improvement District No. 12 et al.,* 142 F. 2d 792, tried with this case.

The fact that Petitioners recited in their pleading, the statutory proceedings by which the Respondent District is enabled to raise the funds for the payment of the judgment, does not bring this case under the doctrine of *Brownsville* v. *Loague.* This is demonstrated by the holding of the Seventh Circuit in *Cushman* v. *Warren-Scharf Asphalt Paving Co.,* 220 Fed. 857, wherein it is said:

> "Fifth. The ancillary proceeding was based upon the judgment itself and the obligation thereby declared and created. The recital in the bill of complaint of the facts leading up to the judgment does not make it an original suit in equity based upon the alleged pre-existing obligation as in *Brownsville* v. *Loague,* 129 U. S. 493, 9 S. Ct. 327, 32 L. Ed. 780, and while a court of equity, when called upon to aid in executing its own former consent decree, may decline to treat it as *res judicata,* and may therefore refuse to deem it binding in respect to the relief granted on the new bill (*Lawrence Mfg. Co.* v. *Janesville Cotton Mills,* 138 U. S. 553, 11 S. Ct. 402, 34 L. Ed. 1005) it has no power, either in an original or ancillary proceeding to go behind a judgment at law, jurisdictionally valid and free from fraud, in search of errors, however gross. *Tilton* v. *Cofield,* 93 U. S. 163, 167, 23 L. Ed. 858; *New Orleans* v. *Fisher,* 180 U. S. 185, 21 S. Ct. 347, 45 L. Ed. 485."

Furthermore, in their Supplemental Petition, Petitioners sought, alternatively, general relief for the enforcement of their judgment. There the prayer is:

> "Plaintiffs would further show that said judgment rendered in the case of *W. L. Shumate, Jr.*, v. *Hidalgo County Water Control and Improvement District No. 12*, hereinabove mentioned, was one rendered upon interest coupons which matured before the date of said judgment. That it was the legal duty of defendant directors of said district to have levied and collected sufficient tax to pay off and discharge said judgment or the interest coupons represented thereby, during the years 1931 to 1937, inclusive, but that said defendants have wrongfully failed and refused to do so and should in this proceeding be compelled by writ of mandamus to levy a sufficient tax for said years 1931 to 1937, inclusive, to pay off and discharge said judgment, both as to principal and interest, making a proper provision for such delinquencies in the payment of taxes which may be levied and assessed, as is reasonable to anticipate. That in all events, defendants should be required to levy and collect sufficient taxes to pay off said judgment within a reasonable length of time, to be determined in the sound discretion of the Court, and in this connection plaintiffs would show that there was no constitutional or statutory limit upon the rate of taxes that may be adopted by said district. as the same is a water control and improvement district organized under the constitutional grant of power contained in Article XVI, Section 59, of the Constitution of the State of Texas.
>
> "Wherefore, Premises Considered, these plaintiffs pray judgment of the Court in accordance with the prayer contained in their original petition filed herein; that all necessary and proper writs of mandamus issue, in order to make effective the relief herein prayed for by plaintiffs, to-wit, the collection of their said Judgment" (R. 88-89).

We respectfully submit, in the light of the foregoing, that the doctrine of *Brownsville* v. *Loague* is no bar to Petitioners' remedy for the enforcement of their judgment.

Conclusion.

Wherefore, Petitioners respectfully submit that this case is one over which this Honorable Court has jurisdiction, and one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision, granting to Petitioners the relief to which they are entitled.

W. C. Laycock,
J. D. Norwood,
W. C. Laycock,
In His Capacity As Agent for the Sole Benefit of W. C. Laycock and J. D. Norwood,

By W. R. MONTGOMERY,
Counsel for Petitioners.

By W. R. Montgomery
Of Counsel.

Edinburg, Texas